(27)

No. 91-194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,
Petitioner,

v.

STATE OF NORTH DAKOTA,
By and Through its Tax Commissioner,
HEIDI HEITKAMP,
Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

RICHARD RUDA *
Chief Counsel
CHRISTINE DESAN HUSSON
MICHAEL G. DZIALO
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether North Dakota Cent. Code § 57-40.2-01(7) violates the Commerce Clause by imposing on businesses engaging in "regular or systematic solicitation" of sales in North Dakota the duty to collect a use tax on sales made to consumers in the State.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

MISCELLANEOUS

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 91-194

QUILL CORPORATION,
Petitioner,
v.
STATE OF NORTH DAKOTA,
By and Through its Tax Commissioner,
HEIDI HEITKAMP,
Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They and their members have a compelling interest in legal issues that affect state and local governments, including questions of taxing author-

ity. The question presented in this case is the validity of a North Dakota statute that imposes use tax collection obligations on businesses that engage in "regular or systematic solicitation" of sales in North Dakota. At least 34 States have enacted similar legislation. *See* National Conference of State Legislatures, *et al.*, Br. *Am. Cur.* on Pet. 7-8 & nn. 6-7. Tax revenue losses totalling billions of dollars per year are at stake. *See* Advisory Comm'n on Intergovernmental Relations, *State Taxation of Interstate Mail-Order Sales: Revised Revenue Estimates, 1990-1992* (1991). *Amici* accordingly submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

Amici adopt respondent's statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. Petitioner Quill's sole objections to the collection duty imposed by the statute in this case—that Quill need not bear the duty either because Quill is not physically present in North Dakota or because the administrative costs of compliance are too great—rest on *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). The case now before the Court puts at issue the power of the *Bellas Hess* decision to support either of these objections.

First, this Court's Commerce Clause jurisprudence has evolved dramatically since 1967. The critical moment for purposes of this case came ten years after *Bellas Hess*. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), the Court recognized that the formalism of its Commerce Clause doctrine no longer bore any "relationship to economic realities," and obstructed rather than facilitated the mechanics of the federal system. The Court determined that it could more effectively coordinate

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.2 of the Court.

the federal machinery by adopting a pragmatic approach. Under that approach, a tax runs afoul of the Commerce Clause if it is imposed on an actor or activity lacking "sufficient nexus" with the State; if it discriminates against interstate commerce, or is unfairly apportioned; or if it is unrelated to the services provided by the State. *See id.* at 277-78, 287.

The *Complete Auto* test rejected the tenet which had long frozen state taxing power—that taxation of "the privilege of engaging in interstate commerce" was *per se* unconstitutional. 430 U.S. at 278. The conclusion of *Complete Auto*'s realistic approach was instead that " 'interstate commerce may be made to pay its way' " when properly and fairly taxed by States with jurisdiction. *Id.* at 281, 288-89. Since 1977, this Court's commitment to the "consistent and rational method of inquiry" adopted in *Complete Auto* has led it to overturn numerous earlier cases and to impose liabilities on a number of industries within the scope of newly operating state authority.[2] *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 443 (1980).

The second reason that the power of *Bellas Hess* warrants reevaluation is that the decision was idiosyncratic even in its time, and now has increasingly aberrant effects. One of the last and most formalistic expressions

[2] *See, e.g., Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978) (overruling *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937) and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947)); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (disapproving of *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922)); *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 292-296 (1987) (disapproving of reasoning of *Aero Mayflower Transit Co. v. Board of R.R. Comm'rs*, 322 U.S. 495 (1947) and *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 295 U.S. 285 (1935)); *Goldberg v. Sweet*, 109 S. Ct. 582, 591 n.16 (1989) (departing from *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U.S. 384 (1935)); *cf. Hughes v. Oklahoma*, 441 U.S. 322 (1979) (overruling *Geer v. Connecticut*, 161 U.S. 519 (1896)).

of the "interstate immunity" rule described above, *Bellas Hess* sounded a discordant note against this Court's underlying conviction that the Commerce Clause should be applied in a practical manner and with cognizance that it was not intended to relieve those doing business in a number of States "'from their just share of [the] state tax burden even though it increases the cost of doing business.'" *Complete Auto*, 430 U.S. at 279 (quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).[3]

Notably formalistic at its point of origin, *Bellas Hess* has become plainly anachronistic. As fully developed by respondent (Resp. Br. 7-10), the contemporary "direct market" bears little resemblance to the business activity typified by the "mail or common carrier" contacts at issue in *Bellas Hess*. 386 U.S. at 754. It is therefore nonsensical to assert that this case is "factually indistinguishable" from *Bellas Hess*. Pet. i. Even if Quill could contrive to carry on business "without regard to . . . the technological advances of the past thirty years" (*id.* at 25), it does not follow that this Court can ground constitutional doctrines on that anomaly.[4]

It is no answer to say, as do Quill and its *amici*, that everyone involved has learned to operate with certain gears of the interstate marketplace frozen. Institutionalizing an anomalous doctrine is no substitute for providing the coherence, rationality, or predictability that best serves all concerned. More to the point constitutionally,

[3] *See, e.g., Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959); *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 349-362 (1944) (Rutledge, J., concurring); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941).

[4] As the Court put it in *Trinova Corp. v. Michigan Dep't of Treasury*, 111 S. Ct. 818, 828 (1991), the principles that govern the validity of state taxes must "seek to accommodate the necessary abstractions of tax theory to the realities of the marketplace." For an example of such an approach in changing technological circumstances, *see Goldberg v. Sweet*, 109 S. Ct. 582 (1989).

the Commerce Clause is meant to coordinate, not stymie, the federal system. It does not "eclipse the reserved 'power of the States to tax'"—a power essential to States' abilities to meet the needs of their citizens—when that power operates in its rightful sphere. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 199 (1824)).

B. By establishing the *Complete Auto* test as the standard for Commerce Clause challenges to state taxation, this Court has simplified the task of reviewing the validity of the state collection duty imposed in this case and with it the continuing validity of *Bellas Hess*. *Amici* therefore apply the test here, as this Court has done when revisiting precedents decided in the "pre-*Complete Auto* era." *Goldberg*, 109 S. Ct. at 591 n.16; *see* note 2, *supra*.

The following discussion devotes especial attention to the first prong of the *Complete Auto* test, the requirement that a State tax only those with "sufficient nexus" to the State, because it is that prong that Quill claims must be limited by the interpretation concretized in *Bellas Hess*. Analysis of this Court's precedents demonstrates, however, that "nexus" has long been defined in essentially functional terms: the question is whether a seller has "'establish[ed] and maintain[ed] a market'" in the State. *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 250 (1987). The fact of physical presence, while relevant as an indicator of activity in the State, has never been dispositive. Moreover, the reasons for its importance in *Bellas Hess* were rendered obsolete by *Complete Auto*. In fact, evolution towards expressly functional tests has been a hallmark of Commerce Clause jurisprudence, and characterizes as well the development of the nexus standard in adjudicatory jurisdiction. The fact that the State here imposes a collection duty alone strengthens the arguments for a functional standard because a collection duty is less oppressive than a direct tax.

The collection duty imposed here satisfies as well the remaining prongs of the *Complete Auto* test. It is fairly apportioned because no more than one State can demand that a seller collect tax on the same sale. The duty is also nondiscriminatory because it is matched by a duty imposed on in-state sellers to collect the same amount of sales tax. Finally, the duty is reasonably related to benefits obtained from the State because the duty is proportionately imposed: a seller collects only on as many sales as it has made. Under no prong do the administrative costs of collecting the tax change the calculus.

Because Quill and its *amici* have relied to an inordinate extent on the argument that the administrative costs of collecting use tax render that duty unconstitutional, this brief concentrates in its second part on that contention. The "administrative costs" argument rests on the discredited "interstate immunity" theory under which interstate commerce avoids paying the costs of carrying on multistate business. In fact, even in the era of "interstate immunity," the Court developed exceptions under which it has already rejected the "administrative costs" argument made here. *See, e.g., Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941). In addition, Quill's argument asks this Court to police the administrative costs of tax compliance by using federal constitutional law. The role is an improper one for the Court because it involves determinations concerning highly fact-specific issues of state fiscal policy. Lastly, *amici* note that Quill's "administrative cost" assertions are not only irrelevant to the legal inquiry required here, they are also overinflated in fact.

ARGUMENT

I. NORTH DAKOTA'S IMPOSITION OF THE DUTY TO COLLECT USE TAX IS CONSTITUTIONAL ACCORDING TO THE STANDARD ADOPTED IN *COMPLETE AUTO TRANSIT, INC. v. BRADY*

The *Complete Auto* test both incorporates the dictates of the Commerce Clause and "encompasses as well the Due Process requirement that there be 'a minimal connection between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" *Trinova Corp.*, 111 S. Ct. at 828 (quoting *Mobil Oil Corp. v. Comm'r*, 445 U.S. at 436-37); *see also Amerada Hess Corp. v. Director, Div. of Taxation*, 109 S. Ct. 1617, 1625 (1989). The Due Process elements of the Commerce Clause inquiry, formerly analyzed as part of the issue whether a State had jurisdiction to tax,[5] now constitute the first and fourth prongs of the *Complete Auto* test. North Dakota's statute neither deprives Quill of due process of law, nor violates those purely Commerce Clause mandates of fair apportionment and nondiscrimination expressed in the second and third prongs of the test.

A. Sufficient Nexus Exists Here Because Quill Took Directed Action To Establish and Maintain a Market in the State

1. *The Functional Core of the Nexus Requirement*

The first prong of *Complete Auto* requires that there be a "sufficient nexus" or "minimal connection" between the interstate activities and the taxing State. *Complete Auto*, 430 U.S. at 278; *Mobil Oil*, 445 U.S. at 436-37. As the

---

[5] *See, e.g., Braniff Airways v. Nebraska State Bd.*, 347 U.S. 590, 598-99 (1954); *Memphis Gas Co. v. Stone*, 335 U.S. 80, 96-97 (1948) (Rutledge, J., concurring), *quoted in Complete Auto*, 430 U.S. at 282.

Court originally framed the inquiry, a State cannot reach a party unless "he have certain minimum contacts with it" so that the exercise of state taxing power "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The question whether "nexus" or "minimal connection" exists between a party and a State requires, in its essence, a functional inquiry. This Court has already determined that the "requisite 'nexus'" for Commerce Clause purposes is supplied if a corporation "avails itself of the 'substantial privilege of carrying on business' within the State." *Mobil Oil*, 445 U.S. at 437 (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-445 (1940)). In another recent case, the Court identified "the crucial factor governing nexus" as "'whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.'" *Tyler Pipe*, 483 U.S. at 250 (citation omitted).

This Court's reasoning in jurisdiction to tax cases has long reduced to precisely such a functional core. *See, e.g., Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960) ("The test is simply the nature and extent of the activities" of a party in the State.); *International Shoe*, 326 U.S. at 320 (sufficient contact where party carried on "systematic and continuous [activities]" resulting in interstate business); *J.C. Penney*, 311 U.S. at 444 (nexus exists if "the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred"); *see also General Motors Corp. v. Washington*, 377 U.S. 436, 440-41 (1964) (nexus exists if "the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation," judged by looking at whether there is a fair proportion between "business activities" in the State and the "opportunities

and protections which the State has afforded"), *overruled in part by Tyler Pipe*, 483 U.S. at 248.[6]

A functional approach that tests whether a corporation has purposefully "avail[ed] itself of the substantial privilege of carrying on business within the State" (*Mobil Oil*) or has undertaken activities "significantly associated with the taxpayer's ability to establish and maintain a market in this state for sales" (*Tyler Pipe*) is tailored exactly to the core due process concern—that a party should be within the power of a State only if it has sought out and benefitted from state opportunities and protections. *See, e.g., J.C. Penney*, 311 U.S. at 444.

The functional standard ensures, first, that a seller has clearly and deliberately directed its attention towards a state market by regular and continuous solicitation or other means; no seller will incur collection responsibilities it has not anticipated and had the chance to avoid. The North Dakota statute meets this requirement by imposing the use tax collection duty only on sellers engaging in "regular or systematic solicitation of sales" by a variety of means. N.D. Cent. Code § 57-40.2-01(7) (Supp. 1991).[7]

---

[6] Justice Rutledge's concurrence in *General Trading Co. v. State Tax Comm'n*, 322 U.S. at 354, most directly states the functional inquiry:

> for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for solicitation . . . or maintaining a place of business. . . .

See also Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 2:7 at 32 (1981 & Supp. 1990) (noting Court's emphasis on "the importance of local market-producing and supporting activities" conducted by the taxpayer when defining nexus in gross receipts cases).

[7] The use tax collection statutes of other States include similar requirements. *See* National Conference of State Legislatures, *et al.* Br. *Am. Cur.* on Pet. 7-8 & nn. 6-7. "Regular or systematic solicitation of sales" for the purposes of N.D. Cent. Code § 57-40.2-01(7)

A functional approach grounded on whether a seller has in fact established and maintained an in-state market also ensures that nexus will not exist if a seller has not enjoyed the opportunities, benefits, and protections afforded by a State through successfully exploiting its market. North Dakota's statute meets this requirement as well. Because the statute imposes solely a *collection* duty on sellers, no obligation comes into play unless sales have taken place. Those sales are made possible only by the market facilities and protections richly described by the State, including roads, telephone service, and a court system enforcing consumer protection and contract laws. *See* Resp. Br. 33-35; *see also General Trading*, 322 U.S. at 353-54 (Rutledge, J., concurring).

Tax collection duties have repeatedly been approved by this Court.[8] Like those, the collection duty here is constitutional because it is imposed on a company deliberately establishing and maintaining a market in the State.

2. *The Anachronism of the Physical Presence Requirement*

The assertion by Quill and its *amici* that nexus can exist only if a seller is physically present within North Dakota "states a rule without disclosing the reasons for it." *Mobil Oil*, 445 U.S. at 445 (rejecting single situs rule where fiction of corporate presence in one location lacked rationale).

In the days when sales were largely consummated in person, physical presence might well have been one rea-

---

is defined to require "three or more separate transmittances of any advertisement or advertisements" during a 12-month period. N.D. Admin. Code § 81-04.1-01-03.1(3) (1991).

[8] *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 93-94 (1934); *Nelson v. Sears*, 312 U.S. at 365-66; *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373, 375 (1941); *General Trading*, 322 U.S. at 338; *Scripto*, 362 U.S. at 212; *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 556 (1977).

sonable indicator of business activity. Accordingly, this Court's pre-*Bellas Hess* cases generally considered whether a party was physically present in a jurisdiction seeking control over it. Yet while physical presence was *relevant* in considering whether a State had jurisdiction to tax, it was never *dispositive* of that inquiry. *See* cases cited pp. 8-9, *supra*.[9] Indeed, in the only other case to invalidate the duty to collect a use tax, *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), the Court declined to elevate physical presence in the form of regular deliveries as sufficient to found jurisdiction. *See id.* at 342. Rather, the Court extracted as the essence of its earlier cases the operational notion that due process requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* at 344-45.[10]

Today physical presence is no longer a *sine qua non*, even in a rough sense, for the conclusion that a seller has

---

[9] *See also Northwestern States Portland Cement*, 358 U.S. at 465 (noting that corporations engaged in "substantial income-producing activity" and ran "vigorous and continuous sales campaigns" by virtue of an in-state presence); *Scripto*, 362 U.S. at 212 (listing fact that no solicitors operated in State as only one factor in distinguishing *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954)); *Nelson v. Sears*, 312 U.S. at 364 (mail order business taxable as part of total state business despite fact that in-state agents not involved in mail order). *Compare General Trading*, 322 U.S. at 338 (degrees of physical presence dismissed as "without constitutional significance") *and id.* at 356 (Rutledge, J., concurring) (substantial contact by seller's or buyer's States may be *either* in sense of territorial sovereignty or in terms of benefits conferred) *with id.* at 339 (Jackson, J., dissenting) (objecting that no jurisdiction exists because no significant physical presence). *See generally* Donald P. Simet, *The Concept of "Nexus" and State Use and Unapportioned Gross Receipts Taxes*, 73 Nw. U. L. Rev. 112, 114-116 (1978).

[10] Consequently, in its efforts to distinguish its *General Trading* precedent from the situation in *Miller Brothers*, the Court relied on the *functions* rather than the *physical presence* of those in the State, characterizing the efforts of traveling salesmen in *General Trading* as an "active and aggressive operation" while denying that the deliveries in *Miller Brothers* constituted an "invasion or exploitation" of the market in Maryland. 347 U.S. at 347.

deliberately targeted a state market. As the Court noted in a related context, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *see also International Shoe*, 326 U.S. at 316-17 (noting that term " 'presence' " is used "merely to symbolize" activities in a State that courts "will deem to be sufficient to satisfy the demands of due process").

The specter of the dysfunctionality of physical presence as an indicator of business activity loomed large even in 1967. *See Bellas Hess*, 386 U.S. at 760-66 (Fortas, J., dissenting). In the pre-*Complete Auto* era, however, physical presence played an additional role. The Court had in that period developed a doctrine of "local activity" which it used to mitigate the sweeping immunity of interstate commerce from taxation: certain aspects of apparently interstate activity were identified as "local" in fact and therefore as taxable. *See generally*, Hartman, *supra*, § 2:18. Physical presence could be used as evidence that activity was in fact local. *See, e.g., Scripto*, 362 U.S. at 211-12 (approving use tax on ground that while "no State can tax the privilege of doing interstate business," salesmen performed the "local function" of solicitation); *Nelson v. Sears*, 312 U.S. at 371 (Roberts, J., dissenting) (denying validity of use tax because "there is, in the conduct of respondent's mail order business, no such local activity"); *cf. Bellas Hess*, 386 U.S. at 759 (since there was "neither local advertising nor local household deliveries," mail order transactions were "exclusively interstate in character").

Institutionalized by the *Bellas Hess* Court to play a largely formalistic role, the physical presence requirement lost that remaining rationale when *Complete Auto* rejected the "interstate immunity" theory and thus obviated

the need to use physical presence as an indicator of "local activity." Accordingly, the Court soon loosened the tie between jurisdiction to tax and the fact of physical presence. Thus in *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977), the Court removed the requirement of a transactional relationship linking the purpose of a seller's physical presence in a State to the existence of taxing jurisdiction over another activity of the seller.[11] 430 U.S. at 560-62; *see also id.* 562-63 (Blackmun, J., concurring) (highlighting difficulty in reconciling Court's reliance on attenuated physical presence in *National Geographic* with its rejection of more related physical presence in *Miller*). In *D.H. Holmes Co. v. McNamara*, 108 S. Ct. 1619, 1624 (1988), involving a use tax on catalogues distributed by a retailer who also ran 13 in-state department stores, the Court elaborated on the retailer's significant in-state "economic presence" and the role of its catalogues in "expanding and enhancing its Louisiana business," points irrelevant if simple physical presence should have ended the jurisdictional inquiry.[12]

The retention of the physical presence requirement now would be pure formalism, anomalous after the fall of the "interstate immunity" view and in an age of interactive faxes. The absurdities of attributing talismanic significance to the physical presence factor have been developed

---

[11] Because the seller in *National Geographic* operated two offices in the market State, the Court did not need further to probe the continuing validity of physical presence as a ground of jurisdiction. *Id.* at 560 n.6. Contrary to Quill's argument (Pet. Br. 27-29), the Court's rejection of a "slightest presence" standard, *id.* at 556, is less an affirmation of the *Bellas Hess* rule than a refusal to adopt a standard not necessary on the facts presented.

[12] Likewise, in *Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560, 562 (1975), a pre-*Complete Auto* case, the Court stressed the importance of the function played by a seller's single in-state employee by noting that the employee "made possible the realization and continuance of valuable contractual relations" between the seller and its client.

in other briefs. Resp. Br. 25-28; International Council of Shopping Centers, *et al.*, Br. *Am. Cur.* 12-15. The greatest anomaly of all is that the States' development of sophisticated markets that facilitate interstate business ultimately undermines their community, since the States' loss of revenue increases in direct relation to the development of sophisticated marketing technology.[13] In such circumstances, the concept of physical presence "should not be solidified into a constitutional barrier" against a fair state statute. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649 (1950).

3. *Doctrinal Evolution toward Functional Standards*

"The history of the Commerce Clause is," as described by Justice Frankfurter, "the history of judicial evolution." *Northwestern States Portland Cement*, 358 U.S. at 473 (Frankfurter, J., dissenting). Given the Court's long-standing commitment "to accommodate the necessary abstractions of tax theory to the realities of the marketplace," *Trinova Corp.*, 111 S. Ct. at 829, the Court has regularly abandoned archaic physical or "[m]etaphysical" formulae in favor of functional criteria. *Travelers Health Ass'n*, 339 U.S. at 648. *Complete Auto's* rejection of the conclusory distinction between nontaxable interstate commerce and taxable local activity is only illustrative of this type of advance. The Court has thus, for example, updated and rationalized Commerce Clause doctrines concerning the extent of State power by rejecting such fictions as the "original package" doctrine (*Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923)); the "home

[13] According to the most recent figures published by the Advisory Commission on Intergovernmental Relations, the revenue loss to States from untaxed interstate direct marketing sales was $2.91 billion in 1990, and is projected to be $3.08 billion in 1991, and $3.27 billion in 1992. For the average sales tax State, the 1990 loss of revenue from use tax was $63.2 million. *See* Advisory Comm'n on Intergovernmental Relations, *State Taxation of Interstate Mail-Order Sales: Revised Revenue Estimates, 1990-1992* 2 (1991).

port" doctrine (*Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949)); the distinction between "direct" and "indirect" burdens on interstate commerce (*Department of Rev. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 750 (1978)); and the doctrine of state "ownership" of wild animals (*Hughes v. Oklahoma*, 441 U.S. 322 (1979)). *See generally* Hartman, *supra*, §§ 2:13-2:18, 2:25.

Evolution towards a functional standard is especially appropriate here since that movement would parallel the development of the doctrine of *in personam* jurisdiction.[14] As more completely developed by other *amici* (*see* International Council of Shopping Centers, *et al.*, Br. *Am. Cur.* 21-23), the contemporary due process limitations on both taxing and adjudicatory jurisdictions had their genesis in the same reasoning. After concluding that "systematic and continuous" business activities that brought a corporation "the benefits and protection" of a State sufficed to constitute "presence" in the State, the *International Shoe* Court held that "[t]he activities which establish [a corporation's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." 326 U.S. at 319-21.

This Court long ago dismissed as obsolete the contention that a State could not exercise *in personam* jurisdiction over a defendant not physically present in the State. *See McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-223 (1957). It stands to reason that the "nexus" requirement of the Commerce Clause, an explicit incorporation of due process limitations on state

[14] That process is marked, as in the case of Commerce Clause jurisprudence, by the progressive replacement of artificial, formal, or physical distinctions by more functional criteria. *See, e.g., St. Clair v. Cox*, 106 U.S. 350 (1882) (rejecting fiction that corporation is physically present only in State of incorporation); *International Shoe*, 326 U.S. at 316 (noting historical ties of *in personam* jurisdiction to physical presence in a State). *See generally* Sandra B. McCray, *Overturning* Bellas Hess: *Due Process Considerations*, 1985 B.Y.U. L. Rev. 265, 271-74.

jurisdiction (*see* p. 7, *supra*), should have the same scope. Territorial boundaries should not be raised as a shield by businesses to avoid either tax or adjudicatory obligations incurred in a State once freedom of access to the State has been commercially exploited. *See Burger King*, 471 U.S. at 474.

4. *Nexus for Tax Collection Duties*

As a matter of logic, law, and doctrinal coherence, any nexus sufficient to ground jurisdiction to *tax* is sufficient, *a fortiori*, to ground jurisdiction to impose a duty to *collect* taxes. Logically, the burden to collect taxes is, of course, less oppressive than the burden to pay them, and includes no risk of double taxation. *See, e.g., Scripto*, 362 U.S. at 211; *National Geographic*, 430 U.S. at 558. It is within the control of the seller to avoid losses by conditioning transfer of the merchandise on collection of the tax.[15] *See, e.g., National Geographic*, 430 U.S. at 558. In this case, moreover, the State reimburses sellers for a portion of their administrative costs. *See* N.D. Cent. Code § 57-40.2-07.1 (Supp. 1991).

National Geographic confirmed that imposition of a duty to collect taxes, as opposed to imposition of a direct tax, *decreases* the need for a restrictive concept of nexus. *See* 430 U.S. at 558; *id.* at 560 (reserving question whether the same amount of contact would suffice for direct tax). Nor do the administrative costs of complying with a valid collection requirement somehow affect the question whether nexus exists: the Court has already and expressly rejected that contention. *See Scripto*, 362 U.S.

---

[15] As the Court put it in *Nelson v. Sears*, 312 U.S. at 366:

> [A seller] is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords [state] residents, or to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid.

at 211, 212-13; *Nelson v. Sears*, 312 U.S. at 365-66; *Nelson v. Montgomery Ward*, 312 U.S. at 375; *cf. National Geographic*, 430 U.S. at 558.[16]

The conclusion that collection duties do not necessitate a restrictive concept of nexus accords with the state of the doctrine in closely related fields. Whereas the presence of property in a State, without more, is insufficient to found jurisdiction over a suit on an unrelated cause of action, *see, e.g., Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court has already held in *National Geographic* that there is no such transactional requirement in order for a State to impose a tax collection requirement when a seller has property in a State. The nexus requirement underlying the imposition of collection duties cannot therefore be *stricter* than those underlying adjudicatory jurisdiction.

Conversely, where lesser nexus requirements clearly prevail, the Court has abandoned as dysfunctional the physical presence test. *See Travelers Health Ass'n*, 339 U.S. at 647 (rejecting need for physical presence where "business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state"); *see also id.* at 648.[17]

In short, there is no reason to disturb the conclusion reached by the State in this case that nexus exists be-

---

[16] In fact, the sellers in both *Nelson* cases submitted calculations demonstrating effects at least as onerous as those claimed here. Sears claimed that compliance costs and losses for which it was liable to the State would total $45,700 for every $100,000 of use tax due (or $5,000,000 in sales). *Nelson v. Sears*, 312 U.S. at 365 n.4; *see also id.* at 367-68 (Roberts, J., dissenting). Montgomery Ward likewise asserted a total $2,490 cost plus loss liability for every $10,000 in tax due. *Nelson v. Montgomery Ward*, 312 U.S. at 375 n.5. The Court rejected these arguments as irrelevant to the constitutional issue.

[17] Although *Travelers Health Association* was decided before *Bellas Hess*, the "interstate immunity" theory did not color its conclusions, since Congress has exempted the insurance industry from Commerce Clause protections. *See* 15 U.S.C. §§ 1011-15 (1988).

cause Quill by regular and systematic solicitation has purposefully availed itself of the privileges, opportunities, and benefits offered by North Dakota. It cannot be said that the State's statute reaches improperly outside the State's borders to take property without "due process of law."

B. The State Has Imposed Its Collection Duty Only on Its Fair Share of the Interstate Activity

"[T]he central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 109 S. Ct. at 588. The requirement thus prohibits the imposition of taxes capable of repetition, either because more than one State could tax the same transaction or because a State taxes a portion of interstate commerce larger than its in-state component. *See id.* at 589.

Use taxes and the corresponding collection duties carry no risk of double taxation. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 583-85 (1937); *National Georgraphic*, 430 U.S. at 558. Applying this Court's "internal" and "external" consistency tests simply confirms the fair reach of the statute in this case. First, the use tax imposed here is "internally consistent" because "if every State were to impose an identical tax, no multiple taxation would result." *See Goldberg*, 109 S. Ct. at 589. No one else can tax the same transaction because the State provides a credit against its use tax if a sales tax has been paid in another State. N.D. Cent. Code § 57-40.2-11 (1983); *see, e.g., D.H. Holmes*, 108 S. Ct. at 1623-24. The same is true, *a fortiori*, as far as the collection duty is concerned, since the seller need not bear the burden of the tax. *National Geographic*, 430 U.S. at 558.

Second, the use tax here is "externally consistent" because "the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 109 S. Ct. at 589. A use tax reasonably reflects the in-state component of interstate activity because, like the sales tax for which it compensates and in proportion to future use, it is "assessed on the individual consumer, collected by the retailer, and accompanies [a] retail purchase." *Id.* The same logic validates the administrative requirements of the collection duty.

C. The Collection Duty Imposed By the State Does Not Discriminate Against Interstate Commerce

The primary inquiry under the discrimination prong of the *Complete Auto* test is whether a statute is "discriminatory on its face." *See Trinova*, 111 S. Ct. at 835. The Court has also considered, independently or as part of this inquiry, whether a statute has a discriminatory intent or effect. *Id.; see also Amerada Hess*, 109 S. Ct. at 1622-23. This Court has most recently clarified that, insofar as the Commerce Clause requires more than "mere facial neutrality[,] [t]he content of that requirement is fair apportionment." *Trinova*, 111 S. Ct. at 835. The discussion above demonstrates that the statute here satisfies the latter requirement.

It is well-settled that neither use taxes nor the obligation to collect them discriminates facially or in any other way against interstate commerce. The use tax imposed by North Dakota is equal to a corollary sales tax on property purchased in-state, and a credit is given in the amount of the use tax if another sales tax has been paid. *See* N.D. Cent. Code §§ 57-39.2-02.1; 57-40.2-02.1 (Supp. 1991); 57-40.2-11 (1983). As the design of the statute indicates, the purpose of the use tax is wholly benign: it is intended "to compensate the state for revenue lost when residents purchase out-of-state goods for use within the State." *D.H. Holmes*, 108 S. Ct. at 1624; *Henneford*, 300 U.S. at 583-85; *Maryland v. Louisiana*, 451 U.S. 725, 758-59 (1981). Thus, "the use tax and the sales tax are complementary. Sales made wholly within [the State]

carry the same burden as these mail order sales." *Nelson v. Sears*, 312 U.S. at 364. The same equality characterizes the obligations imposed on those collecting the use tax relative to those collecting the sales tax. Nor is there any claim that the State has otherwise introduced any illegitimate bias into either the use tax or its collection. *Cf. Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).

The nondiscriminatory nature of the collection duty is made especially clear by analyzing the actual operation of that duty. Because North Dakota imposes both a sales and a use tax, every seller within the State's taxing jurisdiction must calculate, collect, and remit a tax—either "sales" or "use"—on each sale to a North Dakota resident. A seller would gain no advantage, as far as easing its administrative requirements on the sale at issue, by relocating to North Dakota. Thus the measure here fully satisfies the Commerce Clause because it "maintain[s] state boundaries as a neutral factor in economic decisionmaking." *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 283 (1987); *see also Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329-33 (1977); *id.* at 335-36 (striking down scheme that diverted interstate commerce into State despite economic efficiencies of locating business elsewhere).[18] It is this discrimination—not simply the higher costs that attach *in the aggregate* to doing interstate business—that the Commerce Clause prohibits.

[18] The duty here is therefore unlike the tax imposed in *Scheiner*, a flat axle tax that "exert[ed] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" 483 U.S. at 286-87. Here the collection duty is the same whether one is located in or out of State, it attaches proportionately to each sale, and the tax itself correlates with state sales taxes. Thus the seller gains nothing by locating in North Dakota or by selling a higher as opposed to lower volume there, either to escape or reduce administrative requirements, or to offer goods that are competitively priced.

D. The Collection Duty Imposed Here Is Reasonably Related to the Activities of the Seller in the State

The fourth prong of the *Complete Auto* test embodies the due process requirement that a tax be "fairly related to the services provided by the State." 430 U.S. at 279. That is, there must be "'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" *Trinova*, 111 S. Ct. at 828 (citation omitted).

As this Court has made abundantly clear, this prong does not require that a tax be limited by or even "reasonably related to" the *value* of the services provided the taxpayer by the State. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-27 (1981); *Goldberg*, 109 S. Ct. at 591-92. Taxes are assessed on the theory that government provides for "the common good"; the States may therefore require taxpayers to contribute to the general cost of government. *Commonwealth Edison*, 453 U.S. at 622-23. The fourth prong is satisfied when "the *measure* of the tax [is] reasonably related to the extent of the contact." *Id.* at 626.

That requirement is easily met by the statute in this case. By definition, the collection duty here "is assessed in proportion to [the] taxpayer's activities," *Commonwealth Edison*, 453 U.S. at 627, in North Dakota because it is tied to the number of sales made there.

II. THE ADMINISTRATIVE REQUIREMENTS OF COLLECTING USE TAX ARE PART OF THE COSTS OF CONDUCTING A MULTISTATE BUSINESS

Quill and its *amici* have relied heavily on the argument that the administrative costs connected with collecting use tax somehow convert that otherwise valid measure into an unconstitutional burden on interstate commerce. Federal constitutional law does not, however, immunize

multistate businesses from the costs of complying with state tax obligations. Nor can this Court be asked to police the level of such costs. In any case, the costs of compliance are far lower in fact than Quill and its *amici* claim.

A. The Commerce Clause Does Not Place a Ceiling on the Administrative Costs That a Multistate Business May Incur in Complying with Valid State Tax Obligations

1. The constitutional commitment represented by the Commerce Clause is that all parties will have fair and nondiscriminatory access to a multistate market. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935). The Clause therefore operates "'to ensure that each State taxes only its fair share of an interstate transaction.'" *Trinova*, 111 S. Ct. at 836 (quoting *Goldberg*, 488 U.S. at 260-61). The Constitution prohibits "state taxes which . . . either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax, belong of right to other jurisdictions." *Id.*

It in no way follows that "the bare fact that one is carrying on interstate commerce ... [relieves] him from the many forms of state taxation which add to the cost of his business." *Western Live Stock*, 303 U.S. at 254. Rather, within the scope of its authority and by fair means of taxation, a State "is free to pursue its own fiscal policies." *J.C. Penney*, 311 U.S. at 444. Nor will the Commerce Clause dictate or protect "the particular structures" or "methods of operation" in a retail market. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978). That constitutional guarantee guards only "the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127-28.[19]

[19] Thus if administrative costs raise the barriers to entry to the direct market now so low, *see* Direct Marketing Ass'n Br. *Am. Cur.*

Quill's objection to the administrative costs of collecting use tax is premised on a contrary theory. Despite the fact that the State here imposes a reasonable duty on an actor that has sought out and exploited the benefits of an in-state market; that the State is not taxing activities that will be taxed by others; and that the State is not discriminating in favor of local businesses, Quill finds an unconstitutional result in its compliance costs per se. That is, Quill is objecting to the costs inherent in engaging in business in a federated society in which no unit is abusing its power.

The argument resurrects the "interstate immunity" theory; it fails the *Complete Auto* test precisely because that test is designed to reject it. It is a basic premise of the contemporary marketplace that businesses should expand nationally only insofar as they can afford the costs—including the tax burdens—of doing multistate business. *See, e.g., Washington Stevedoring*, 435 U.S. at 748. Indeed, the responsibility for collecting use tax pales in comparison to tax obligations routinely borne by in-state retailers as an inherent cost of doing business, including state and local property taxes, business taxes, income taxes, gross receipts taxes, and collection duties on sales taxes.

Conversely, if Quill's administrative costs exonerate it as a matter of constitutional law from collecting use tax

15, or cause some smaller interstate businesses to be replaced by larger ones, the problem is an economic, not a constitutional, one. *See Exxon*, 437 U.S. at 126-28. If these results are unpalatable, other governmental bodies properly make the policy or protectionist decisions:

> Under our federal system, the determination [as to the appropriate level of state taxes] is to be made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests.

Commonwealth Edison, 453 U.S. at 628.

on these sales, it need collect no tax at all on them.[20] The irony of the argument is obvious—by *exploiting multiple* state markets, a direct marketer avoids the obligation to contribute to *any* of them. That result is incompatible with this Court's recognition that where parties " 'purposefully derive benefits' " from interstate activities, they cannot escape the obligations that may attach. *Burger King*, 471 U.S. at 473-74 (quoting *Kulko v. California Superior Court*, 436 U.S. 84, 96 (1978)); *see Commonwealth Edison*, 453 U.S. at 620 n.9.[21]

2. In fact, even in the era of "interstate immunity," the Court had developed exceptions under which it had already rejected the "administrative costs" argument made here. As described above, the Court attempted to ensure that interstate commerce "pa[id] its own way" at least some of the time by distinguishing between activities that were essentially local and those that were purely interstate commerce. *See, e.g., Henneford*, 300 U.S. at 582 (use tax applies "after commerce is at an end"); *Western Live Stock*, *supra*; *see also* cases cited at p. 12, *supra*. Consistently with this method, the Court explicitly rejected the "administrative costs" argument developed by the retailers in *Nelson v. Sears*, 312 U.S. at 365-66, and *Nelson v. Montgomery Ward*, 312 U.S. at 375. *See* note 16, *supra*.[22]

---

[20] North Dakota could not impose sales tax on the sales, *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944), nor apparently could Illinois reach the transaction, *see Eveo v. Jones*, 409 U.S. 91, 93-94 (1972); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938) (both involving gross receipts taxes). Under Pub. L. 86-272, 15 U.S.C. § 381 (1988), neither would direct marketers be liable for net income tax apportioned to market state activity.

[21] The Court has, in fact, similarly rejected the argument in closely related contexts that administrative inconvenience amounted to a due process violation. *See McGee*, 355 U.S. at 224; *Travelers Health Ass'n*, *supra*.

[22] The principal support for Quill's position occurs only in dissent and on the now obsolete ground that "exclusively interstate commerce" should not be taxed. *See Northwestern States Portland*

As these cases indicate, even in the pre-*Complete Auto* era, the Court had developed a method "crucial for protecting States' taxing power." *Commonwealth Edison*, 453 U.S. at 615. Since the business activity upon which the collection duty here is premised would qualify as a "local activity" (assuming a functional nexus standard), Quill must have this Court resurrect its "interstate immunity" doctrine in its most formalistic avatar, stripped even of the "local activity" qualification, in order to prevail.

B. The Court Cannot Properly Police the Administrative Costs of Complying with Nondiscriminatory and Fairly Apportioned Taxes by Using Federal Constitutional Law

"In essence," Quill "ask[s] this Court to prescribe a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate" acceptable levels of administrative costs that can attach to "activities that are conceded to be legitimate subjects of taxation." *Commonwealth Edison*, 453 U.S. at 628. This Court has already refused to calculate "acceptable rates or levels of taxation." *Id.* *A fortiori* and for the same reasons it should refuse constitutionally to calibrate administrative costs.

1. *Legislative Nature of the Determination*

First, goals of "economy in administration" for taxpayers, as much as for States, are "questions of fiscal policy" that cannot be answered by the Court. *Henneford*, 300 U.S. at 588; *see, e.g., Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279-80 (1978) (determining best method of taxation is legislative "policy decision" inappropriate for Court); *Trinova*, 111 S. Ct. at 836 (same); *Common-*

Cement, 358 U.S. at 474 (Frankfurter, J., dissenting); *see also Nelson v. Sears*, 312 U.S. at 367-71 (Roberts, J., dissenting) (objecting to imposition of collection costs on same grounds).

wealth Edison, 453 U.S. at 628 (same); *see also* Hartman, *supra*, § 2:27 at 163-64 (Supp. 1990).[23] The arguments made by Quill and its *amici*, including the arguments that the direct marketing industry must be protected and that other methods of taxation are available to the States, make this point clear. One need only imagine, to drive the point home, the kind of determinations the Court would need to make as it proceeded—for instance, what kind of flat, unified tax rates would adequately minimize administrative requirements, or whether and what type of recoupment provisions made by States would be sufficient to reimburse collection costs and therefore remove the constitutional burden.[24]

Second, such supervision would involve extremely complicated factual investigations. *See Commonwealth Edison*, 453 U.S. at 628. Here, for example, much material not properly in the record has been introduced, *see, e.g.*, Direct Marketing Ass'n Br. *Am. Cur.* App., and extrapolations have been made from self-serving congressional

[23] As the Court put it in *J.C. Penney*, 311 U.S. at 445:

> At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making.

[24] This approach would assume, conversely, that legislatures are insensitive to the reasonable requirements of an important commercial industry. This Court has properly declined to "second-guess" legislative decisions of this kind. *See Commonwealth Edison*, 453 U.S. at 427 n.16; *Moorman Mfg.*, 437 U.S. at 279-80. The common existence of recoupment provisions like that of North Dakota's (N.D. Cent. Code § 57-40.2-07.1 (Supp. 1991)) corroborates the Court's judgment. *See, e.g.*, Fla. Stat. § 212.12(1) (Supp. 1990); Ga. Code Ann. § 48-8-50 (Michie 1982); Ky. Rev. Stat. § 139.570 (Michie/Bobbs-Merrill Supp. 1991); Mo. Ann. Stat. § 144.140 (Vernon 1976); Tex. Tax Code Ann. §§ 151.423-151.424 (Vernon Supp. 1991).

testimony without cross-cutting evidence being presented, *see, e.g., id.* Br. 20. Under these conditions, the courts cannot conduct a thorough review of the actual extent of the administrative costs claimed.

For these reasons, this Court has repeatedly declined the role offered here by Quill and its *amici*, even at the expense of tolerating some risk of duplicative taxation. *See, e.g., Trinova*, 111 S. Ct. at 829 (accepting geographically imprecise apportionment formula given State's decision that other methods of calculation raised serious theoretical and practical difficulty); *Goldberg*, 109 S. Ct. at 590 (approving state system of taxing telephone calls despite some risk of multiple taxation); *Commonwealth Edison*, 453 U.S. at 627-29 (declining to set severance tax levels); *Moorman Mfg.*, 437 U.S. at 279-80 (declining to establish uniform rules for division of income despite risk of multiple taxation). There is no such risk here; *a fortiori*, the Court should confirm that "[u]nder our federal system," such determinations are "to be made by state legislatures in the first instance and, if necessary, by Congress." *Commonwealth Edison*, 453 U.S. at 628; *see id.* at 637-38 (White, J., concurring).[25]

2. *Propriety of Action by the Court*

The argument that the "extremely limited restrictions" placed on the States by the Commerce Clause, *J.C. Penney*, 311 U.S. at 445, include the need for the Court to police the character and weight of administrative costs should be rejected in this case for both prudential and jurisprudential reasons.

In every tax case and so long as we have a federal system, the obligations incurred by a business operating in many States are in some degree burdensome. *See,*

[25] The fact that bills have repeatedly been introduced in Congress to correct *Bellas Hess* legislatively only *confirms* that the problem has not escaped legislative attention. *See Commonwealth Edison*, 453 U.S. at 628 n.18.

e.g., *Moorman*, 437 U.S. at 278-79 (detailing complexities of apportionment formulas); Albert H. Cohen, *State Tax Allocations and Formulas Which Affect Management Operating Decisions*, 1 J. Taxation 2 (1954). The same argument that Quill makes here—that its compliance costs "burden" interstate business—could be raised in any one of a thousand cases.[26]

Only the Court can lay the argument to rest. As reviewed above, it rests on a notion of interstate commerce that has been decisively rejected by this Court in *Complete Auto* and its progeny. That is, the "primary alteration" in Commerce Clause jurisprudence has already taken place. *Washington Stevedoring*, 435 U.S. at 749.

The reason that the Court should take action, however, rests on grander doctrinal grounds as well. As the Court put it in *Washington Stevedoring*, 435 U.S. at 749:

> The Commerce Clause does not state a prohibition; it merely grants specific power to Congress. The prohibitive effect of the Clause on state legislation results from the Supremacy Clause and the decisions of this Court.

Insofar as the *Bellas Hess* decision rested on due process grounds, it is thus not clear that it could be altered by the congressional action Quill and its *amici* propose. In any case, the Commerce Clause justifies only those "prohibitive effects" necessary to guard the functioning of the federal system. Invalidation of North Dakota's fair and reasonable statute is not one of them.

---

[26] Quill, like any in-state corporation, could object to the duties imposed on it as so confiscatory as to constitute a taking. *Commonwealth Edison*, 453 U.S. at 627 n.17. It cannot, however, conflate that argument with its interstate character as if that places it in a "privileged position." *Id.* at 628.

C. The Costs of Collecting Use Tax Are Not Burdensome In Fact

1. Quill and its *amici*'s empirical argument about the costly nature of collecting use tax mistakes at the outset the very facts of this case. The North Dakota Supreme Court in this case held N.D. Cent. Code § 57-40.2-01(7) (Supp. 1991) constitutional as applied to Quill, thus placing at issue *only* a state tax. According to this holding, Quill needs to calculate and apply one use tax rate and file one return to comply with its state use tax obligation. There is no constitutionally significant complexity to fulfilling this obligation for every State, territory, and the District of Columbia.

Further, the State in this case reimburses Quill for its administrative costs in collecting use tax. *See* N.D. Cent. Code § 57-40.2-07.1 (Supp. 1991). There is no showing by Quill, a large direct marketer, that this amount is insufficient to reimburse it for its costs.

2. Even assuming this case placed at issue the obligation of sellers to collect local as well as state use taxes, Quill and its *amici* have greatly exaggerated the administrative difficulties that face a direct marketer.

The State has detailed the computerized systems, available at low costs and for use on personal computers, that make routine calculating and complying with varied state and local tax obligations. Resp. Br. 39-42. In addition, businesses can subscribe to services that supply manuals detailing the state and local tax rates nationwide. *Id.* at 43. The State also details the extent to which Quill and its *amici* have overstated the complexity of the multistate tax system itself. *Id.* at 43-44. It is, in sum, a manageable administrative task to comply with the tax laws of each State in which a direct marketer does business.

CONCLUSION

The judgment of the Supreme Court of North Dakota should be affirmed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
CHRISTINE DESAN HUSSON
MICHAEL G. DZIALO
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
* *Counsel of Record for the*
Amici Curiae

December 1991